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FILED
JUN 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6298

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOIS MAE MILLS,

Appellant,

v.

DAN HABLUETZEL,

Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

JOINT APPENDIX

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Counsel for Appellee

APPEAL DOCKETED MARCH 7, 1981.
PROBABLE JURISDICTION NOTED APRIL 27, 1981.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 6, 1978, Petitioners' Lois Mae Mills and the Texas Department of Human Resources original petition, filed in the 156th Judicial District Court of San Patricio County, Texas.

October 16, 1978, Respondent, Dan Habluetzel's original answer filed.

April 4, 1979, Order dismissing Petitioner's Original Petition signed by Judge Rachel Littlejohn of the 156th Judicial District Court.

March 19, 1979, Appellants' Lois Mae Mills and the Texas Department of Human Resources notice of appeal to the Texas 13th Court of Civil Appeals filed.

July 19, 1979, Appellee, Dan Habluetzel's Motion to Change the Style of the Case to In the Interest of A.B.D., a child.

January 31, 1980, the 13th Court of Civil Appeals enters Judgment affirming the dismissal of Petitioner's Original Petition.

April 18, 1980, Appellants, Lois Mae Mills and the Texas Department of Human Resources, filed their Application for Writ of Error in the Texas Supreme Court.

April 28, 1980, Appellee, Dan Habluetzel, filed his reply to Appellants' Application for Writ of Error.

July 16, 1980, the Supreme Court of Texas refuses to consider Appellants' Lois Mae Mills and the Texas Department of Human Resources Writ of Error.

December 10, 1980, the Supreme Court of Texas overrules Appellant's Lois Mae Mills, Application for Rehearing.

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
MINOR CHILD

ORIGINAL PETITION TO ESTABLISH THE PARENT-CHILD RELATIONSHIP

Filed October 6, 1978

This suit is brought by the County Attorney of San Patricio County, Texas, for the Texas Department of Human Resources pursuant to the terms of a contract between the Texas Department of Human Resources and San Patricio County, Texas and by Lois Mae Duncan Mills.

I.

No other Court has continuing jurisdiction of the child who is the subject of this suit.

II.

The following child the subject of this suit, is not the legitimate child of any man, Archie Burton Duncan, a male child born February 12, 1977.

III.

Support rights for the above-named child have been assigned to the Texas Department of Human Resources pursuant to TEX. REV. STAT. art. 695c, Section 18-B.

IV.

The mother of the child is Lois Mae Duncan Mills, who was born on October 11, 1956 and who resides at Rt. 1 Box 521, Ingleside, Texas 78362.

V.

Petitioners allege that Dan Hobluetzel whose age is — and who resides at 1526 S. Main, Ingleside, Texas 78362, hereinafter called Respondent, is the biological father of the child who is the subject of this suit.

Process should be served at that address or at the Respondent's regular place of business which is ———.

VI.

There are no court-ordered conservatorships, guardianships, or other court-ordered relationships affecting the child who is the subject of this suit.

VII.

No property of value is owned or possessed by the child.

VIII.

The purpose of this suit is to establish the parent-child relationship between the father of the child who is the subject of this suit and such child by establishing that the Respondent is the biological father of such child and by obtaining a final court decree to such effect, together with such other and further orders and relief as would follow such determination under the Texas Family Code, all of which are requested.

IX.

The best interest of the child—the subject of this suit will be served by appointment of the mother as managing conservator and Petitioners so request.

X.

The mother of the child is without sufficient financial resources to provide support for the minor child.

XI.

The Texas Department of Human Resources is currently providing $110.00 per month in public assistance payments for the support of the child and has been providing since August, 1978.

XII.

Petitioners request the Court to appoint a guardian ad litem to represent the interest of the child—the subject of this suit.

XIII.

Respondent is financially able to contribute for the support and maintenance of the minor child in such amounts and at such times this Court may determine to be just and proper.

XIV.

Petitioners request the Court, after appearance of Respondent to order the mother, the father, and the child to submit to blood tests and to prescribe the arrangements for the tests.

Petitioners request that, after completion of the blood tests, the Court Orders all parties to appear in person or by counsel at a pre-trial conference to hear the oral testimony of depositions concerning such blood tests and findings of the Court appointed examiners and if any qualified examiners of blood tests called by any party.

IV.

It was necessary to secure the services of the County Attorney of San Patricio County, a licensed attorney, to preserve and protect the child's rights. Dan Habluetzel, Respondent, should be ordered to pay a reasonable attorney's fee, and a judgment should be rendered in favor of the County Attorney's office and against Respondent; or, in the alternative, such reasonable attor-

ney's fee should be taxed as costs and be ordered paid directly to the County Attorney's office, all as is provided for in Section 21.39 of the Family Code.

PRAYER

Petitioners pray that citation be issued to all persons entitled to citation under the law.

Petitioners pray that the Court enter judgment establishing paternity of the alleged father in accordance with the purpose of the suit as above set forth that the mother be appointed managing conservator that any other relief requested be given, and for attorney's fees, cost and general and specific relief as the Court deems proper.

Petitioners pray further that any payments ordered to be made by the Respondent for the support and maintenance of his minor child be ordered paid, by money order or cashier's check payable to the Texas Department of Human Resources and mailed to the District Clerk, P.O. Box 1084, Sinton, Texas 78387 and said Clerk shall forward such payments to said Department, to the extent that the Department has supplied the needs of said child and for as long as the Department continues to provide support for the said child, provided further that in the event that said Department discontinues making payments for the benefits of the named child said Department shall notify the said Registry in writing of such discontinuance and thereafter all such payments received under this Order shall be paid over to: Lois Mae Duncan Mills, Rt. 1 Box 521, Ingleside, Texas 78362.

TEXAS DEPARTMENT OF
HUMAN RESOURCES

By: /s/ Richard D. Hatch
RICHARD D. HATCH,
County Attorney of
San Patricio County, Texas
Room 102—Courthouse,
Sinton, Texas
Attorney for Petitioner
Pursuant to Contract
between Texas Department
of Human Resources and
San Patricio County, Texas

/s/ Lois Mae Duncan Mills
Petitioner

STATE OF TEXAS
COUNTY OF SAN PATRICIO

Lois Mae Duncan Mills, being duly sworn, deposes and says: That she is a Petitioner herein and that she has read the foregoing petition and knows the contents thereof and that the same is true.

/s/ Lois Mae Duncan Mills
Petitioner

SWORN TO AND SUBSCRIBED before me this the 5th day of October, 1978.

[SEAL]

/s/ Patsy Martinez
Notary Public in and for
San Patricio County, Texas

Name and Address of
Notary Public
Patsy Martinez
Taft, Texas 78390
My commission expires:
May 10, 1980

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

ANSWER OF RESPONDENT DAN HABLUETZEL

Filed October 16, 1978

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES DAN HABLUETZEL, Respondent in the above entitled and numbered cause and files this his Original Answer and Plea In Abatement and would show the Court as follows:

I.

The Respondent specially excepts to the whole of Petitioner's Original Petition inasmuch as it appears therefrom that Petitioner's action as therein stated accrued more than one (1) year before the date of the filing of this suit; and that the same is barred by limitation, as provided in Section 13.01, Texas Family Code.

WHEREFORE, premises considered, Respondent prays Judgment of this Special Exception and Plea and that he go hence with his costs without day, and that this case be dismissed.

/s/ Lola L. Bonner
LOLA L. BONNER
BONNER & JACKSON
Attorneys At Law
P.O. Drawer 908
Rockport, Texas 78382
Attorneys for Respondent

II.

Answering further, if further answer be needed, Respondent denies all and singular each and every allegation contained in Petitioner's Original Petition and demands strict proof thereof.

WHEREFORE, Premises considered, Respondent prays that Petitioner take nothing by his suit and that he go hence without day with his costs.

/s/ Lola L. Bonner
LOLA L. BONNER

THE STATE OF TEXAS)
)
COUNTY OF ARANSAS)

BEFORE ME, the undersigned authority in and for said County and State, on this day personally appeared LOLA L. BONNER, who, on oath stated that she is the attorney for DAN HABLUETZEL, Respondent herein; that she has authority to make this Affidavit; and that the statements in this Original Answer and Plea In Abatement are true.

/s/ Lola L. Bonner
LOLA L. BONNER

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 12th day of October, A.D., 1978.

/s/ Marianne Gould
MARIANNE GOULD
Notary Public in and for
Aransas County, Texas
My Commission Expires: 7-7-79

[SEAL]

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

ORDER OF DISMISSAL

BE IT REMEMBERED, that on the 16th day of March, 1979, came on to be heard Respondent's and Movant's, DAN HABLUETZEL, plea in abatement and motion to dismiss, and came Petitioner by and through its attorney of record and came Respondent, in person and by his attorney.

It appearing that Petitioner having judicially admitted in its petition that the child the subject of this suit was born on February 12, 1977, and it appearing of record that this suit was filed on October 6, 1978, and after hearing testimony and arguments of counsel, it is the opinion of the Court that Respondent-Movant's plea in abatement and special exception, citing Section 13.01 of the Texas Family Code as the statute of limitation barring the filing of this suit, is well taken, and Petitioner having in open Court having admitted same, in that this suit is brought after the child has attained the age of one (1) year, and that there are, therefore, no issues in dispute,

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that said Cause herein filed be in all things DISMISSED, with prejudice.

Costs ADJUDGED against Petitioner, for which let exception issue.

Signed this 4th day of April 1979.

/s/ Rachel Littlejohn
RACHEL LITTLEJOHN
Judge
156th Judicial District
San Patricio County, Texas

IN THE DISTRICT COURT OF
SAN PATRICIO COUNTY, TEXAS
156TH JUDICIAL DISTRICT

No. 20267

IN THE INTEREST OF
ARCHIE BURTON DUNCAN,
A MINOR CHILD

NOTICE OF APPEAL

Filed March 19, 1979

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Texas Department of Human Resources by the County Attorney of San Patricio County, Texas, and gives notice that it excepts to the dismissal of this suit on March 16, 1979, and gives notice that it desires to appeal to the Court of Civil Appeals, sitting at Corpus Christi, Texas, from the said dismissal.

/s/ Richard D. Hatch
RICHARD D. HATCH
County Attorney

Certificate of Service (omitted in printing)

IN THE COURT OF CIVIL APPEALS FOR THE
SUPREME JUDICIAL DISTRICT OF TEXAS
Corpus Christi, Texas

No. 1547

TEXAS DEPARTMENT OF HUMAN RESOURCES, APPELLANT

vs.

DAN HABLUETZEL, APPELLEE

MOTION TO CHANGE STYLE OF CAUSE

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now comes DAN HABLUETZEL, Appellee in the above cause and moves the Court to change the style of this cause thereby returning to the style which it assumed and retained throughout the lower Court proceedings and would show the Court as follows:

I.

The case was filed October 6, 1978, in the 156th Judicial District Court of San Patricio County, Texas, and was styled "In The Interest Of Archie Burton Duncan, Minor Child", a style which was used throughout the proceedings including the Order of Dismissal signed by the Honorable Rachel Littlejohn, Judge of Said Court.

II.

That upon transmittal to this Honorable Court for appeal, the style was changed to the Department of Hu-

man Resources vs. Dan Habluetzel, which style is prejudicial to Appellee, inasmuch as no determination of paternity has been made.

WHEREFORE premises considered, Appellee prays judgment of this Motion and that the Clerk of this Honorable Court be directed to continue the style by which the case was known to the 156th Judicial District Court.

Respectfully submitted,

LOLA L. BONNER
Attorney at Law
P.O. Drawer 908
Rockport, Texas 78382

COURT OF CIVIL APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
Tenth Floor
Nueces County Courthouse
Corpus Christi, Texas 78401

January 31, 1980

Mr. Richard D. Hatch
County Attorney
San Patricio County Courthouse
Sinton, Texas 78387

Mr. John H. Flinn
Attorney at Law
P.O. Box 1112
Sinton, Texas 78387

Ms. Lola L. Bonner
Bonner & Jackson
Attorneys at Law
P.O. Drawer 908
Rockport, Texas 78382

Re: Cause No. 1546 (Tr. Ct. No. 20610)
Texas Department of Human Resources
v.
Juan Hernandez

Cause No. 1547 (Tr. Ct. No. 20267)
Texas Department of Human Resources
v.
Dan Habluetzel

Dear Attorneys:

The Court affirmed the judgments of the trial court in the above two causes today, January 31, 1980. A full opinion discussing all the issues was written in #1546,

which opinion will be published. The opinion in #1547 refers to the companion case for the reasons supporting the judgment, and will not be published. Both opinions and judgments are enclosed.

The Court also ruled on the motions pending in #1547. Appellee's motion to dismiss for want of jurisdiction was denied. The motion to change the style of the case was granted, and the style changed to IN THE INTEREST OF A. B. D.

Very truly yours,

SHIRLEY SELZ
Clerk

SS:cc
Enclosure
cc: Honorable Rachel Littlejohn, District Judge
Honorable Ronald M. Yeager, District Judge
Mrs. Winnie Light, District Clerk

COURT OF CIVIL APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31st day of January, 1980. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

Cause No. 1547 (Tr. Ct. No. 20267)

IN THE INTEREST OF

A. B. D., A MINOR CHILD

On appeal to this Court from
San Patricio County, Texas

JUDGMENT—January 31, 1980

On appeal from the 156th District Court of San Patricio County from an order of dismissal rendered April 4, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

SHIRLEY SELZ
Clerk

IN THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT CORPUS CHRISTI, TEXAS

Number 1547

IN THE INTEREST OF
A. B. D., A MINOR CHILD

On appeal from the 156th District Court
of San Patricio County, Texas

OPINION—January 31, 1980

The Texas Department of Human Resources [TDHR] sued a man hereinafter referred to as "defendant," alleged to be the biological father of a child, under the provisions of Section 13.01 et seq. of the TEX. FAMILY CODE to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. Defendant filed a "Plea in Abatement" in which he specially excepted to TDHR's petition on the basis that suit was barred by the statute of limitations set forth in TEX. FAMILY CODE, § 13.01, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child.[1] In its "Order of Dismissal" the trial court granted defendant's "plea in abatement and motion to dismiss" with prejudice on the

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[1] Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship betwen a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

grounds that, while TDHR had "judicially admitted" that the child was born February 12, 1977, suit was not filed until October 6, 1978. The issues before this Court, except for a procedural point which is raised by TDHR and which we shall address first, are identical to those considered and decided by us this day in Texas Department of Human Resources v. Juan Hernandez, cause number 1546. As in that case, we affirm.

By its fourth point of error, TDHR complains of the manner in which the trial court disposed of the case. Specifically, TDHR asserts that, instead of dismissing the lawsuit with prejudice after a preliminary hearing, the trial court should have either allowed TDHR to amend its pleadings or waited for defendant to resort to the summary judgment process. Since the court did neither, TDHR feels that somehow it has been prejudiced and therefore the cause should be reversed. We disagree.

Although defendant's answer to TDHR's original petition is styled a plea in abatement, it is actually a plea in bar. A misnomer of the pleadings is not controlling and the court can look to the substance of the plea and treat it accordingly. Texas Highway Dept. v. Jarrell, 418 S.W.2d 486 (Tex. Sup. 1967); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ); Rule 71, T.R.C.P. Defendant's contention that TDHR's suit is barred by limitations is a plea in bar because it goes to plaintiff's right to recover. 2 McDonald, Texas Civil Practice, § 7.04(A)(I) (1975); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ). A plea in abatement, on the other hand, would set forth some obstacle to further prosecution of the cause until it is removed. Life Ass'n of America v. Good, 71 Tex. 90, 8 S.W. 639 (1888).

A plea in bar by limitations ordinarily is an affirmative defense. Rule 94, T.R.C.P. Where a pleading, however, affirmatively states facts which demonstrate that the suit is barred, an exception may be used to test the pleadings. Hubler v. City of Corpus Christi, 564 S.W.

2d 816 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Mueller v. Banks, 317 S.W.2d 254 (Tex. Civ. App.—San Antonio 1958, no writ); 1 McDonald, Texas Civil Practice, § 7.19 (1971). That is essentially the situation in the case at bar because TDHR's pleadings show on their face that the child was born more than one year before the petition originally was filed. Ordinarily, when the plea involved is, in truth and fact, a plea in abatement, a court which sustains an exception thereto should not dismiss the suit summarily because plaintiff has the right to amend and plead additional facts, such as circumstances which would avoid the bar of limitations. Acme Color Art Printing Co., Inc. v. Brown, 488 S.W. 2d 507 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). We recognize the general rule that a plea of limitations should not be sustained at a preliminary hearing unless the summary judgment process is used or the parties agree. Kelly v. Bluff Creek Oil Co., 309 S.W.2d 208 (Tex. Sup. 1958); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex. Civ. App.—Dallas 1976, no writ). In the case at bar, however, there were no additional facts which plaintiff could have pled in order to avoid the bar of limitations because, as the trial court's order of dismissal indicates, TDHR admitted in open court that the original petition had been brought after the child had attained the age of one year. We have, this day, held (Texas Department of Public Resources v. Juan Hernandez) that the one-year statute of limitations provided for by Section 13.01 of the Family Code cannot be tolled by the child's infancy. In this particular case, therefore, we deem it proper to treat the trial court's order of dismissal as a summary judgment that plaintiff take nothing. See Robinson v. Buckner Park, Inc., 547 S.W.2d 60, 61 n. 1 (Tex. Civ. App.—Dallas, 1977, writ ref'd n.r.e.). The fourth point of error is overruled.

By its points of error 1 through 3, TDHR asserts that Section 13.01 of the Family Code is unconstitutional or, in the alternative, that it is tolled by reason of infancy.

We have addressed these issues and found them to be meritless in the Hernandez case, above mentioned, a companion case to the case at bar, decided this day. Based upon the reasoning set forth in *Hernandez*, we overrule points of error 1 through 3. There being no further allegations of reversible error, the order of the trial court dismissing the suit with prejudice is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

IN THE SUPREME COURT OF TEXAS

No. B-9337

July 16, 1980

IN THE INTEREST OF A.B.D., A MINOR CHILD

From San Patricio County
Thirteenth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Thirteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Texas Department of Human Resources, pay all costs incurred on this application.

No. B-9337

December 10, 1980

IN THE INTEREST OF A.B.D., A MINOR CHILD

From San Patricio County
Thirteenth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 11th day of December, 1980.

GARSON R. JACKSON
Clerk

By /s/ Fritzi Born
FRITZI BORN
Deputy

IN THE COURT OF CIVIL APPEALS
CORPUS CHRISTI

No. 1547

and

IN THE SUPREME COURT OF THE
STATE OF TEXAS

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL, APPELLEE

"In the Interest of A.B.D., a Minor"

No. B-9337

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 6, 1981

Notice is hereby given that Lois Mae Mills, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Texas entered January 31, 1980, affirming the Order of Dismissal of the trial court rendered April 4, 1979. A timely petition for Writ of Error to the Supreme Court of the State of Texas was "Refused. No Reversible Error," on July 16, 1980 and overruled a timely Motion for Rehearing on December 10, 1980. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Michael S. Mankins
MICHAEL S. MANKINS
Counsel for Appellant
COASTAL BEND LEGAL SERVICES
117 W. Sinton
Sinton, Texas 78387
AC 512-364-3805

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 27, 1981

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT

v.

DAN HABLUETZEL

APPEAL from the Court of Civil Appeals of Texas, Thirteenth Supreme Judicial District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 27, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 348941 507